Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

GARY T. MITCHELL,

Petitioner,

v.

BERNIE C. THOMPSON, individually and as Sheriff of the County of Kankakee, State of Illinois; EDWARD JACKSON, individually and as Chief Deputy Sheriff of the County of Kankakee, State of Illinois; and the COUNTY OF KANKAKEE, State of Illinois, a municipal corporation,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. May a county sheriff demote a deputy sheriff for failing to assist the sheriff in his reelection campaign and for refusing to allow those under his supervision to participate in the sheriff's reelection campaign while they are working on county time.

2. May a county sheriff claim qualified immunity for the demotion of a deputy for purely political purposes.

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IN THE

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GARY T. MITCHELL,

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Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Gary T. Mitchell respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 18 F.3d 425. The opinion of the district court is not reported.

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION IN THIS COURT IS INVOKED

Jurisdiction of this Court is sought to review a decision by the United States Court of Appeals for the Seventh Circuit which was issued on March 7, 1994. There was no motion for a rehearing and no order affecting a motion for rehearing. The District Court had jurisdiction of the civil rights claim which is involved in this case pursuant to 28 U.S.C. §§ 1331 and 1343(3). The Petitioner's claims involve allegations made pursuant to 42 U.S.C. § 1983.

STATEMENT OF CASE

Gary Mitchell, the Petitioner, has alleged that he was demoted on November 14, 1990, for refusing to participate in the Respondent, Sheriff Bernie Thompson's, reelection campaign and for refusing to allow those under his supervision to participate in the Respondent's reelection campaign during their working hours. He was demoted from the chief deputy in charge of investigative and crime prevention services to that of third watch patrolman supervisor. Prior to the Respondent's election as sheriff, in December, 1986, the Petitioner had served as a Kankakee County sheriff's deputy. In July, 1986, the Petitioner had been promoted to the position of sergeant.

The Respondents filed a Motion to Dismiss the Petitioner's Complaint on the basis of qualified immunity. The Respondents' motions were denied by the District Court. The Respondent's appealed the denial of their motions to the Seventh Circuit Court of Appeals and the decision of the District Court was reversed on March 7, 1994.

This Petition for Writ of Certiorari follows. The federal jurisdiction of the District Court and the Seventh Circuit

were based upon the fact that the Petitioner's original claim involved allegations made pursuant to 42 U.S.C. § 1983. Jurisdiction was asserted in the Circuit Court pursuant to 28 U.S.C. § 1291.

ARGUMENT

I. THE DECISION OF THE CIRCUIT COURT OF APPEALS IS CONTRARY TO THIS COURT'S PRIOR DECISIONS PROHIBITING THE TERMINATION OF EMPLOYEES OF THE STATE BASED SOLELY ON POLITICAL CONSIDERATIONS.

This Court has established that termination of state employees for political purposes based upon political considerations is forbidden by the First Amendment to the United States Constitution. In *Elrod v. Burns*, 427 U.S. 347 (1976), this Court stated:

> "(Patronage) dismissals severely restrict political belief and association. Though there is a vital need for government efficiency and effectiveness, such dismissals are on the balance not the least restrictive means for fostering that end. . . . We hold therefore that the practice of patronage dismissals in unconstitutional under the First and Fourteenth Amendments. . . ." 427 U.S. at 372-373.

The Court further expanded this concept in *Branti v. Finkel*, 445 U.S. 507 (1980). In that case this Court held that two assistant public defenders could not be terminated solely for their political beliefs. The holding provided that the discharged employees need only show that they were discharged solely for political purposes. 445 U.S. 517. This Court approved an injunction prohibiting an employer from terminating the employment solely on political grounds.

This Court expanded its position in the *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990). There the issue before this Court was whether the issue of political loyalty could be used as a basis for the promotion, transfer recall or hiring decisions. This Court held that no such political considerations were proper. This Court noted that political belief and association constitute the core of those activities protected by the First Amendment to the United States Constitution. 497 U.S. at 69. This Court expressly rejected the Seventh Circuit Court of Appeals restrictive application of protections provided to a government employee. The Court noted:

> "The First Amendment prevents the government, except in the most compelling circumstances, from wielding its power to interfere with its employees fired on to believe and associate, or not to believe and associate." 497 U.S. at 76.

The Seventh Circuit's decision in this case flies in the face of this authority. It is contrary to this Court's very clear position that political considerations should not influence the termination or demotion of government employees. To the contrary the Seventh Circuit Court of Appeals has established a line of cases which specifically allow a sheriff to terminate deputy sheriffs based solely on political consideration. This case is the most grievous of those cases.

In this case, the Petitioner, a long time sheriff's deputy was demoted because he declined to actively engage in the Sheriff's campaign for reelection. He did not campaign against the Sheriff, he simply refused to take any action. His value as a sheriff's deputy had been shown by his promotions, two of which had occurred under the current sheriff.

The decisions of the Seventh Circuit do not prevent the government through the Sheriff from wielding its power to interfere with an employee but actually encourage such interference. In this case, the Petitioner has committed two acts. First, he refused to actively campaign for the Sheriff's reelection. As pointed out by Justice Wood in his dissent, "the Petitioner's other misdeed was that he declined to allow the deputies under his supervision to campaign for the Sheriff's reelection during their regular working hours." Both of these acts are clearly an exercise of the Petitioner's right *not* to associate. Neither threaten the Respondent, nor do either threaten effective law enforcement. However, the Sheriff's actions seriously threaten the Petitioner's rights as guaranteed under the First and Fourteenth Amendments to the United States Constitution.

The Seventh Circuit in the *Upton v. Thompson*, 930 F.2d 1209 (7th Cir. 1991) permitted the termination of a probationary deputy who had actively campaigned against the newly elected sheriff. Similarly, in *Heideman v. Wirsing*, 7 F.3d 659 (7th Cir. 1993), the court allowed the termination of a deputy who had given a political speech during the sheriff's election campaign. Laying the ground work for the decision in the instant case, the Seventh Circuit held in *Dimming v. Whal*, 983 F.2d 86 (7th Cir. 1993), that a new deputy may be discharged merely for failing to support rather than actively opposing the incumbent sheriff's reelection bid.

The policy statements established by the Seventh Circuit Court of Appeals are directly opposite to the policies established by this Court in the *Elrod*, *Branti*, and *Rutan*, decisions. The policy established by the Seventh Circuit Court of Appeals encourages the dismissal of deputies for

solely political reasons. Those political reasons are not merely the exercise of the deputies' First Amendment Rights against the current sheriff, but also the exercise by the deputy of the right to do nothing, to take no political action for or against the sheriff. As the District Court held in this case, "as of June, 1990, it was clearly established constitutional jurisprudence that government officials could not discharge or make adverse personnel decisions concerning a public employee solely because a political affiliation unless the party affiliation was an appropriate requirement for the position involved." See District Court decision, Appendix B. *Rutan v. Republican Party of Illinois*, 110 S. Ct. 2729, 2732 (1990). This Court through *Rutan*, reaffirmed the holdings in *Branti v. Finkel*, 445 U.S. 507 (1980) and *Elrod v. Burns*, 427 U.S. 347 (1976) and extended them to all personnel decisions, including demotions.

Thus, it is the contention of the Petitioner in this case that the decision of the Seventh Circuit Court of Appeals which allows the demotion of the Petitioner for his refusal to participate in the sheriff's reelection campaign and for his refusal to allow those under his supervision to participate in the campaign during their working hours is contrary to the prior decisions of this Court and establishes a policy which is not only derogatory to effective law enforcement, but more importantly makes a mockery of the Petitioner's rights which are guaranteed by the First Amendment and Fourteenth Amendment to the United States Constitution.

II. THE RESPONDENT SHOULD NOT BE ENTITLED TO CLAIM QUALIFIED IMMUNITY WHEN THE LAW AS IS ESTABLISHED BY THIS COURT AT THE TIME OF THE ACTION WAS CLEAR AND UNEQUIVOCAL.

The Respondents claim they are entitled to qualified immunity pursuant to *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Under that decision the Court held "governmental officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate *clearly established statutory or constitutional rights* of which a reasonable person would have known." *Id.* at 818 (emphasis added). The Seventh Circuit Court of Appeals has found that the First Amendment Right not to be required to participate in the sheriff's reelection campaign was not clearly established at the time that the Petitioner's demotion occurred. In its decision in this case, the Court held that the decisions in *Upton, Demmig, Heideman,* (see supra), all decided after the sheriff's action in this case, established that the law did not clearly forbid the sheriff from either firing or demoting a deputy for solely political purposes.

The Petitioner contends in this case that there was no confusion until the Seventh Circuit created the confusion by the decision in the *Upton* case and its progeny. This Court had clearly established the right to be free from demotion or termination based solely on political considerations. Further, one clearly cannot claim that the decision of the Seventh Circuit Court of Appeals is consistent with any decision of this Court. To rely upon subsequently decided decisions to claim that there was confusion regarding the status of the law at the time that the action occurred is a "Catch-22" argument that can carry no weight.

The right of the Petitioner to be free from political considerations in his place of employment was established by this Court. The action of the Respondent to demote him for refusing to take political action violated clearly established constitutional standards. Therefore, the Respondent should not be allowed to make the claim of "qualified immunity".

III. THE DECISION OF SEVENTH CIRCUIT COURT OF APPEALS CREATES A CONFLICT BETWEEN THE CIRCUITS.

The Seventh Circuit has justified its holding in this case by making a finding that deputy sheriff's stand in the position of policy makers. This label as a "policy maker" is used to justify the exclusion of deputies from this Court's previous holdings. This decision and holding is contrary to the holding in other Circuits. In *Jones v. Dodson*, 727 F.2d 1329 (4th Cir. 1984), the court held that the duties of a deputy sheriff do not involve policy making related to "partisan interests." The court went on to hold "on this basis we hold that if the deputy sheriff's discharge was solely because of his political party affiliation, it could not as a matter of law be justified under the *Branti* test." 727 F.2d at 1338.

The establishment of this deviation from the *Branti* holding by this Court of Appeals and by the decision in this case is indicative of the need for this Court to intervene and to make a determination as to whether or not a deputy sheriff may be terminated or demoted solely for political reasons.

CONCLUSION

For the reasons stated herein, the Petitioner, GARY T. MITCHELL, does hereby request this Court grant his Petition for Writ of Certiorari and review the matters contained herein.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 93-1002

GARY T. MITCHELL,

Plaintiff-Appellee,

v.

BERNIE C. THOMPSON, ET AL.,

Defendants-Appellants.

Appeal from the United States District Court
for the Central District of Illinois, Danville Division.
No. 91-C-2089—**Harold A. Baker,** *District Judge.*

ARGUED NOVEMBER 3, 1993—DECIDED MARCH 7, 1994

Before WOOD, JR., FLAUM, and EASTERBROOK,
Circuit Judges.

FLAUM, *Circuit Judge.* Gary Mitchell ("Plaintiff") alleged that Kankakee County, Bernie Thompson (the County Sheriff) and Edward Jackson (Thompson's Chief Deputy), violated numerous constitutional and statutory guarantees by demoting him in retaliation for his refusal to actively support Thompson's 1990 reelection. Defendants Thompson and Jackson filed a motion to dismiss Plaintiff's suit based on qualified immunity. The district court denied the motion. Thompson and Jackson here appeal. We reverse and remand this case with instructions to dismiss Plaintiff's suit against the defendants.

I. Background

In early 1986 Plaintiff was serving as a Kankakee County deputy under the Republican sheriff, and was promoted to sergeant in July of that year. In November 1986 the Republican Sheriff lost the sheriff's election to Thompson, the Democratic candidate. Following Thompson's election, Plaintiff received two further promotions, first to chief of investigative services, and then, several months later, to Chief Deputy for Kankakee County. Apparently, Plaintiff served Sheriff Thompson satisfactorily, at least until early December 1989 when Thompson announced his bid for reelection. It was then that Thompson actively solicited Plaintiff's personal support, and that of his staff, for the campaign. Plaintiff refused both to support Thompson and to allow those under his supervision to participate in the campaign during office hours. Thompson then demoted Plaintiff to Third-Watch Supervisor. In response, Plaintiff sued alleging violations of his First Amendment and Fourteenth Amendment rights. Thompson and Jackson claimed qualified immunity, and thus moved to dismiss Plaintiff's suit. Contrary to the magistrate judge's recommendation, the district court denied defendants' motion. Thompson and Jackson appealed. For the purposes of this appeal we assume that Plaintiff's demotion was in retaliation for his non-support of Thompson's reelection bid.

II. Analysis

The issue here presented is one which we are all too familiar—whether a public official is entitled to qualified immunity from a civil suit because the law was not clearly established at the time of his alleged misconduct. In their appeal, Thompson and Jackson argue that they are entitled to qualified immunity. We agree.

Over the past year this court has had occasion to decide a substantial number of qualified immunity cases.[1] Thus,

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[1] A Westlaw search revealed that in 1993 the Seventh Circuit decided forty-four cases dealing with the issues of qualified im-

(Footnote continued on following page)

as we recently stated in *Anderson*, No. 93-1694, slip op. at 5, we will refrain from generally adding to that already encyclopedic volume of law. Here let it suffice for us to say that qualified immunity shields, from civil liability, government officials who perform discretionary functions so long as their conduct does not violate a law clearly established at the time of their alleged misconduct. *Id.*, citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1992); *see also Donovan*, No. 92-4112, slip op. at 4-5. Among this circuit's qualified immunity cases, we previously have had the opportunity to consider how qualified immunity might apply to a county sheriff accused of political patronage. *See Heideman v. Wirsing*, 7 F.3d 659 (7th Cir. 1993); *Dimmig v. Whal*, 983 F.2d 86 (7th Cir. 1993); *Upton v. Thompson*, 930 F.2d 1209 (7th Cir. 1991).

In *Upton*, a newly elected sheriff sacked a freshly hired deputy who had actively campaigned for the incumbent. 930 F.2d at 1210. The deputy subsequently sued alleging that the sheriff had violated the First Amendment. While assuming the truthfulness of the plaintiff's allegation, the *Upton* court granted summary judgment for the sheriff based on qualified immunity. *Id.* The reason given for this holding was that, as of 1986, the law did not clearly forbid a sheriff from firing one of his deputies for purely political motives. *Id.* Furthermore, the Supreme Court has taught in *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980), as understood in this circuit, *see Tomczack v. City of Chicago*, 765 F.2d 633 (7th Cir. 1985), *cert. denied*, 474 U.S. 946 (1985), that a sheriff may continue to use bare political considerations in determining who will serve as one of his deputies. *Upton*, 930 F.2d at 1218. Since *Upton* this circuit has considered the

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[1] *continued*

munity. *See Anderson v. Holmes*, No. 93-1694, slip op. at 5, n.4 (7th Cir. Feb. 10, 1994). For a more extensive discussion of qualified immunity *see Donovan v. City of Milwaukee*, No. 92-4112, slip op. at 4-5 (7th Cir. Feb. 18, 1994).

limits of a county sheriff's ability to fire his deputies for political reasons. *See Heideman v. Wirsing*, 7 F.3d 659 (7th Cir. 1993); *Dimmig v. Whal*, 983 F.2d 86 (7th Cir. 1993). In *Heideman*, we heard the appeal of a deputy who alleged that he had been wrongfully terminated for his political speech during the sheriff's election campaign. In granting the sheriff qualified immunity we again stated that "[a] sheriff may use political considerations when determining who will serve as a deputy sheriff." 7 F.3d at 664, citing *Upton*, 930 F.2d at 1218. In *Dimmig*, we actually expanded *Upton* somewhat by holding that a new deputy may be discharged merely for failing to support, rather than actively opposing, the incumbent sheriff's reelection bid. *Dimmig*, 983 F.2d at 87. *Upton*, *Heideman*, and *Dimming* pose a steep obstacle to Plaintiff's suit.

For support, Plaintiff cites the Supreme Court's holding in *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990),[2] claiming that it clearly forbids Thompson's political demotion of Plaintiff, thus foreclosing Thompson's and Jackson's claim of qualified immunity. We disagree. While creating an exception to the patronage rules for low-level employees, *Rutan* does little if anything to strengthen Plaintiff's position. *See Heideman*, 7 F.3d at 662, discussing *Rutan*, 497 U.S. at 74. On the contrary, *Rutan*, decided only six months before Thompson's alleged misconduct, may have moderately complicated this area of the law, so as to actually weaken Plaintiff's argument that this law was clearly established. *See Upton*, 930 F.2d at 1217 (stating that *Rutan* "has recently complicated the patronage question").

Therefore, from the holdings presented in *Upton*, *Dimmig* and *Heideman*, we conclude that as of November 1990 the law did not clearly forbid Thompson from either

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[2] The Supreme Court in *Rutan* forbid patronage based employment practices over low-level employees. 497 U.S. at 71-73. The court stated that such practices violated these employees' First Amendment guarantees. *Id.*

firing a deputy, or taking the lesser step of demoting one, for political purposes. Thompson could reasonably have believed that the position of trust and authority occupied by Plaintiff, as the chief deputy, actually made Plaintiff more susceptible than a regular deputy to the demands of political patronage. Thompson and Jackson are thus entitled to qualified immunity for their conduct relating to Plaintiff, and accordingly, the district court should have granted Thompson's and Jackson's motion to dismiss.[3]

III. Conclusion

For the foregoing reasons we reverse the district court and remand this case with the instructions that Plaintiff's suit should be dismissed with prejudice.

REVERSED and REMANDED.

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[3] We have not, of course, reached the merits in this case. Whether today the Sheriff's conduct should be adjudged unconstitutional is not a matter we need to address here. We can demur to the dissent's point that *Upton* and its progeny may be distinguished. Judge Wood's policy argument alone does not *clearly establish* retroactively the laudable proposition of law which he advances. Under the prevailing precedent, unless the law is *clearly established* at the time of the challenged conduct, a defendant is entitled to qualified immunity.

WOOD, JR., *Circuit Judge*, dissenting. Judge Flaum has well and succinctly stated the law regulating patronage dismissals or demotions. Nevertheless, I am compelled to state a different view, even in the face of the precedents cited, in order to call attention to this law enforcement situation.

Plaintiff, as chief deputy, was, as you have seen, demoted because he declined to actively engage in the Sheriff's campaign for reelection. He did not, however, campaign against the Sheriff. He was neutral. He had been a deputy for a long time and had been promoted twice by the Sheriff who then demoted him because of his political neutrality. Plaintiff's other "misdeed" was that he declined to allow the deputies under his supervision to campaign for the Sheriff's reelection during their regular working hours.

The county has an ordinance authorizing sheriffs to appoint full-time deputies according to "merit principles." What happened in this case has nothing to do with merit, only politics. It was not claimed that the chief deputy was, for instance, incompetent, uncooperative at least in professional matters, antagonistic, disloyal, or insubordinate. Nor is it claimed that this chief deputy, in any degree, interfered with or failed to carry out the Sheriff's law enforcement policies. There is no reason suggested for the demotion other than that the chief deputy wanted to do his law enforcement job undiluted by politics and have those deputies under him do theirs, at least while on county time. The Sheriff, however, wanted them all out campaigning for him. Law enforcement unfortunately appears to be secondary to politics, likely not a unique situation in these important offices.

The Sheriff and his chief deputy certainly must work together with mutual trust. The reason they apparently cannot in this case is the fault of the Sheriff, not the chief deputy. I view the Sheriff's actions as a disservice to law enforcement. The Sheriff has all the leeway he needs to be able to fire or demote his deputy for legitimate cause. Politics should not be an active ingredient of good law enforcement.

The majority opinion concludes that the holdings in *Dimmig v. Whal*, 983 F.2d 86 (7th Cir. 1993), *Heideman v. Wirsing*, 7 F.3d 659 (7th Cir. 1993), and *Upton v. Thompson*, 930 F.2d 1201 (7th Cir. 1991), did not for immunity purposes clearly forbid the firing of the chief deputy. In *Upton*, 930 F.2d at 1210, the fired deputy actively and personally supported the losing candidate which at least distinguishes it from the present case. In *Dimmig* the fired deputy was only on probationary status and vulnerable, but this court also makes clear that the fired deputy was neutral and campaigned against no one. *Id.* at 87. Except for the probationary status that is the present case. Judge Eschbach dissented noting the deputy was fired because he would not campaign for the sheriff which is a form of compelled speech repugnant to the First Amendment. *Id.* at 88. In *Heideman* the fired deputy was also a probationary deputy and in addition got in a barroom hassle growing out of his opposition to the winning sheriff candidate. That distinguishes it from the present case. In his concurrence in *Heideman*, 7 F.3d at 664, Judge Ripple points out that "[m]any communities in this nation have recognized that politics and police work not only need not go hand in hand, but ought not to go hand in hand." *Tomczack v. City of Chicago*, 765 F.2d 633 (7th Cir. 1985), *cert. denied*, 474 U.S. 946 (1985), is also cited by the majority. That case, however, involved an employee of the city water department, not a law enforcement officer. I therefore have no objection to the result reached in *Tomczack*. Except for *Tomczak*, which I do not see as applicable, these cases the majority cites were decided after plaintiff was demoted and forecast continued law enforcement personnel actions governed by politics. These cited cases, however, can all be factually distinguished from our present case.

People everywhere are deeply concerned about the extremely serious national crime situation and are searching for ways to do something about it from the Congress to farmers in our rural areas. This court could help. One thing that surely will not advance our crime fighting ef-

forts is to have deputy sheriffs hired, fired, or demoted on the basis of which one of them can best work voting precincts in behalf of the sheriff boss. Instead the basis must be professional competence and abilities. The citizens are the losers even more than this particular chief deputy. Other law enforcement people will continue to be plagued by law enforcement politics and so will our citizens.

Back in 1832 Alexis de Tocqueville said that politics "is the only pleasure an American knows." Keeping law enforcement on a professional law enforcement basis, rather than on a political one, would not unduly limit our political pleasure which we have plenty of already.

I join the views of my colleagues Judge Eschbach and Judge Ripple expressed in the other cases and therefore ask our court to reexamine and reconsider even our recent decisions relating to law enforcement patronage practices, but only as relates to politically neutral law enforcement officers like the plaintiff in this case. I do not see our opinions as being compelled by the Supreme Court. There is no reason in these crime-troubled times for law enforcement personnel to be under the same rule as non-law enforcement personnel. If we do not draw the law enforcement politics exception line in sheriff's offices we will have to continue in the future to risk politics where it does not belong.

I must, therefore, respectfully dissent.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

[Filed December 18, 1992]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

GARY T. MITCHELL,	)	
	)	
Plaintiff,	)	
vs.	)	No. 91-2089
	)	
BERNIE C. THOMPSON, et al.,	)	
	)	
Defendants.	)	

ORDER

The plaintiff, Gary Mitchell, has sued Kankakee County, its sheriff, Bernie Thompson, and chief deputy, Edward Jackson, alleging his retaliatory demotion for not actively supporting Thompson's 1990 re-election campaign. Mitchell claims violation of his Due Process and First Amendment rights, violation of 42 U.S.C. §1983, §1985 and §1988, and common law retaliatory discharge.

The County has filed a motion to dismiss[1] (docket #13) and the sheriff and chief deputy have filed a motion for

[1] Also pending is a motion by the County to dismiss the original complaint (docket #7). The plaintiff has filed a first amended complaint against which the County has filed another motion to dismiss (docket #13). The clerk is directed to terminate the motion in docket #7 as moot.

judgment based on qualified immunity (docket #22). Magistrate Judge Kauffman held a hearing on the motions and recommended that they be granted (docket #28). The plaintiff filed a timely objection asserting the defendant has not shown, as a matter of law, that Mitchell held a policymaking position and that granting Thompson and Jackson qualified immunity is contrary to the principles of *Elrod-Branti-Rutan.* At this time, the court sustains the objection to the recommendation and denies the motions to dismiss and for qualified immunity.

BACKGROUND

The plaintiff alleges that Thompson was elected sheriff of Kankakee County in December of 1986. When Thompson took office, Mitchell had been a sergeant with the sheriff's office for approximately six months; Thompson appointed him to chief of the investigative services division. On December 1, 1988, Mitchell was promoted to chief deputy in charge of the investigative and crime prevention services division. He held this position until November 14, 1990, when he was demoted to third watch patrol supervisor allegedly because of his lack of participation in Thompson's campaign.

Mitchell claims that Thompson solicited his involvement in Thompson's 1990 re-election campaign. Mitchell states he was not actively involved with any political campaign and prohibited his staff from campaigning during work hours. He alleges Thompson told him to permit Mitchell's subordinates to work on campaign activities during County time and that all employees who had been disloyal during the campaign would be demoted or lose their position. The plaintiff alleges his position was not affected by political interest and was subject to merit principles.

DISCUSSION

The County claims it is entitled to dismissal according to *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978) and that it is not responsible for the sheriff's personnel decisions. *Monell* held that a municipality cannot be liable under §1983 on a *respondeat superior* theory. 436 U.S. at 691. Citing *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986), Mitchell claims the County is answerable under §1983 because the policies of the sheriff have become the policies of the County through delegation of authority from the County to the Merit Commission to the sheriff. He has provided the county ordinances, Merit Commission articles and Sheriff's Office policy manual to support this theory. Municipal liability may attach under §1983 to a single unlawful decision or course of action by an official who is responsible for establishing final policy for the municipality. *Pembaur*, 475 U.S. at 483-485.

The county ordinances authorize the sheriff to appoint all deputies and provide that personnel matters regarding full-time deputy sheriffs shall be pursuant to merit principles. Kankakee County Ordinances §10-16 et seq. The Merit Commission rules and regulations provide for the selection and promotion of full-time deputies by merit principle and delegate the hiring decision to the sheriff. The policy of the sheriff's office places hiring and selection decisions in the sheriff. Under *Pembaur*, the County may be liable for the actions of the sheriff.

A court may dismiss an action for failure to state a claim under Fed. R. Civ. P. 12(b)(6) only if it "appears beyond a doubt that the plaintiff can prove no set facts in support of [its] claim which would entitle [it] to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Gregory v. Nunn*, 895 F.2d 413, 414 (7th Cir. 1990). The court must

accept as true the well-pleaded allegations in the plaintiff's complaint. *Gregory*, 895 F.2d at 414.

The allegations in plaintiff's amended complaint, if proven, support his claims against the County that, by delegation, it became responsible for the policies of the sheriff. As the recommendation indicated, the County cannot be liable if the individuals are not liable. Defendants Thompson and Jackson have moved for judgment as a matter of law based on qualified immunity and disposition of the County's motion ultimately is intertwined with the issue of qualified immunity.

QUALIFIED IMMUNITY

Government officials performing discretionary functions are entitled to qualified immunity from liability for civil damages if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The threshold immunity question is whether the law was clearly established at the time the conduct occurred that a person in the plaintiff's position and with his activity could not be demoted for political reasons. If it was not clearly established, the official is entitled to qualified immunity; if it was, the immunity defense fails. *Id.* at 818-819.

As of June 1990, it was clearly established constitutional jurisprudence that government officials could not discharge or make adverse personnel decisions concerning a public employee solely because of political affiliation unless party affiliation was an appropriate requirement for the position involved. *Rutan v. Republican Party of Illinois*, ____ U.S. ____, 110 S.Ct. 2729, 2732 (1990). *Rutan* re-affirmed the holdings in *Branti v. Finkel*, 445 U.S. 507 (1980) and

Elrod v. Burns, 427 U.S. 347 (1976) and extended them to all personnel decisions, including demotions. Shared political affiliation may be an appropriate requirement for confidential or policymaking positions. However, "the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether *the hiring authority can demonstrate* that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518 (emphasis added).

Relying upon *Upton v. Thompson*, 930 F.2d 1209 (7th Cir. 1991), Sheriff Thompson and Chief Deputy Jackson claim they are entitled to qualified immunity because at the time they demoted Mitchell he did not have a clearly established constitutional right, as chief deputy in charge of investigative services, to be free from political retaliation. The Magistrate Judge found this case legally indistinguishable from *Upton*. Recommendation at 5. The court finds that case, decided six months after the conduct in question, factually inapposite and legally distinguishable.

Upton involved two cases consolidated on appeal where deputies were fired in 1986 for political party affiliation that differed from the newly-elected sheriffs'. Deputy Upton had been a political adversary of Thompson's and organized political opposition to him. *Upton*, 930 F.2d at 1211. Upton had been actively involved in the political campaign of Thompson's opponent, displayed the opponent's bumper sticker on his car, and was acting president of the local chapter of the Illinois Fraternal Order of Police that had decided to endorse the opponent. *Id.* at 1210-1211.

The other plaintiff in *Upton*, Thulen, took "a high profile in a hotly contested campaign." *Id.* at 1216. He was the brother of the former sheriff, had been an outspoken supporter of his brother's candidacy, put up signs and attended fundraising events. *Id.* at 1211. The Seventh Circuit emphasized that the plaintiffs in *Upton* actively opposed the newly-elected sheriffs and that it was questionable whether the deputies could execute the sheriffs' policies. *Id.* at 1216. The Court of Appeals noted that are there circumstances where "a politically silent deputy [could] officially align with a party simply by voting in the . . . election. This contrasts sharply with the politically active deputy who, by vociferously campaigning for the loser, encounters Matthew 26:52: 'All they that take the sword shall perish with the sword.' " *Id.* at 1218.

Mitchell alleges that he was politically neutral and was fired because he requested county workers not to perform campaign activities during county time. In this case, there is no indication that Mitchell had "taken up the sword" against Thompson. *Id.* He was "a politically silent deputy" who was demoted simply by casting his vote. The court respectfully disagrees with the Magistrate Judge's recommendation and finds that, as the hiring authority, the defendants have not shown that the party affiliation of and political activity by the chief deputy of investigative services were necessary for the effective performance of that position in 1990. *Branti*, 445 U.S. at 518. The ordinances, regulations and policies Mitchell has submitted indicate that deputy positions were protected by the Merit Commission and the defendants have not established that Mitchell's position was exempted from these regulations.

CONCLUSION

The court sustains the plaintiff's objections to the recommendation of the Magistrate Judge and declines to adopt it. Under the teachings of *Rutan-Branti-Elrod*, defendants Thompson and Jackson are not entitled to qualified immunity for the actions they took in December 1990. The County of Kankakee remains potentially liable for the policies of defendants Thompson and Jackson under *Pembaur*, and its motion to dismiss fails.

IT IS THEREFORE ORDERED that the defendant County of Kankakee's motion to dismiss the complaint (docket #7) is MOOT;

IT IS FURTHER ORDERED that the Magistrate's recommendation (docket #28) is REJECTED;

IT IS FURTHER ORDERED that defendant County of Kankakee's motion to dismiss the first amended complaint (docket #13) is DENIED;

IT IS FURTHER ORDERED that defendants Thompson and Jackson's motion for judgment on qualified immunity (docket #22) is DENIED.

Enter this 18th day of December, 1992.

/s/ HAROLD A. BAKER
UNITED STATES DISTRICT JUDGE

APPENDIX C

[Filed March 26, 1992]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
AT DANVILLE

GARY T. MITCHELL,	)	
	)	
Plaintiff,	)	
vs.	)	No. 91-2089
	)	
BERNIE C. THOMPSON, et al.,	)	
	)	
Defendants.	)	

RECOMMENDATION

This is an action for damages and equitable relief filed pursuant to 42 U.S.C. §§1983 and 1985. Now before the court are the defendants' Motion to Dismiss (Docket #7 & #13) and Motion for Judgment (Docket #22). The motions are fully briefed and pursuant to Local Rule 1.4 I have held a hearing. Pursuant to 28 U.S.C. §636(b)(1)(B), I recommend that the motions be allowed and judgment be entered in favor of the defendants and against the plaintiff.

For the purpose of these motions the facts are not in issue, and the facts pleaded in the complaint are taken

as true. The plaintiff was a long-time employee of the Kankakee County Sheriff. He served as a deputy sheriff and was appointed a Sergeant on July 1, 1986. The defendant Bernie C. Thompson was elected sheriff of Kankakee County on or about December 1, 1986. On December 1, 1988 Thompson appointed the plaintiff Chief Deputy Sheriff of Kankakee County.

On or about December 1, 1989 Thompson announced his bid for re-election and actively solicited the support of the plaintiff and others in the sheriff's department. The plaintiff was not an active supporter and did not approve of deputies under his supervision participating in Thompson's re-election campaign during active duty hours.

On or about November 14, 1990 Thompson demoted the plaintiff from Chief Deputy to Third Watch Patrol Supervisor. For the purpose of these motions, the demotion was in retaliation for the plaintiff's non-support of Thompson's re-election bid.

The pending motions address different issues and will be addressed separately. Defendant Kankakee County moves to dismiss (#7 & 13). A complaint should not be dismissed unless it appears from the pleadings that the plaintiff could prove no set of facts in support of his claim which would entitle him to relief. *Conley v Gibson*, 355 U.S. 41 (1957). For purposes of a motion to dismiss, the complaint is construed in the light most favorable to the plaintiff and its factual allegations are taken as true. *Scheuer v Rhodes*, 416 U.S. 232 (1974). In addition, a complaint must contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory. *Sutliff, Inc. v Donovan Cos.*, 727 F.2d 648 (7Cir.1984).

The County argues that it is not responsible for the actions of the sheriff, who is an elected public official, citing *Thompson v Duke*, 882 F.2d 1180 (7Cir.1989). In *Thompson* the Seventh Circuit held that Cook County would not be legally responsible for the alleged failure to train employees of the county Department of Corrections, which was by statute administered and run by the Sheriff. The court held that the county board had no control over the sheriff or how he chose to train jailers.

The plaintiff cites *Zook v Brown*, 865 F.2d 887 (7Cir. 1989), which held that the county is liable for actions of the Sheriff in disciplining a deputy, when the county has delegated such matters to a Civil Service Commission, which in turn delegates the matters to the Sheriff.

The case at bar is factually much more similar to *Zook* than to *Thompson*. The plaintiff argues that Kankakee County has delegated disciplinary matters to the Sheriff, who is then the ultimate decision maker as defined in *Pembaur v City of Cincinnati*, 475 U.S. 469 (1986). Under the *Conley* standard, the plaintiff states a claim against the County. The arguments contained in the Motions to Dismiss do not withstand controlling case law. However, the ultimate disposition of the county defendant is tied to the disposition of the individual defendants. If the individuals are not liable, the county is not liable.

The individual defendants argue that they are entitled to judgment on qualified immunity under *Harlow v Fitzgerald*, 457 U.S. 800 (1982). *Harlow* allows public officials with discretionary authority immunity from damage actions if the action complained of did not offend clearly established legal rights at the time. *Harlow* provides courts with a purely objective standard in reviewing such actions.

If in 1990 there was no clearly established right to be free from political considerations in the position of Chief Deputy Sheriff, then the defendants are not entitled to qualified immunity. If the right was not clearly established, then immunity attaches as to any claim for money damages.

The Seventh Circuit has recently considered the actions of Sheriff Thompson in taking employment actions based on political considerations. In *Upton v Thompson*, 930 F.2d 1209 (7Cir. 1991) the plaintiff was fired from his position as a deputy sheriff for supporting Thompson's opponent in an election. The District Court had found on the basis of *Elrod v Burns*, 427 U.S. 347 (1976) and *Branti v Finkel*, 445 U.S. 507 (1980), that the right to be free from political considerations in terminations from public employment was clearly established in 1986, and denied the qualified immunity defense. The circuit court reversed, finding first that the law was not clearly established in 1986, second that the law was not clearly established in 1991, and third, that a sheriff may terminate a deputy on purely political considerations. The court concluded:

> "We are thus confronted with the same question faced in *Livas* [711 F.2d 798 (7Cir.1983)]—"whether [political considerations] can be an appropriate requirement for the effective performance" of a deputy sheriff's duties. In this situation we believe the answer is yes. Based on this court's approval of political terminations in other contexts, we conclude that deputy sheriffs operate with a sufficient level of autonomy and discretionary authority to justify a sheriff's use of political considerations when determining who will serve as deputies." 930 F.2d at 1218.

Based on the findings and reasoning in *Upton*, not only are the individual defendants entitled to qualified immunity, the plaintiff fails to state a claim on which any relief

can be granted, monetary or equitable. If a regular deputy sheriff can be terminated for purely political considerations, then certainly the Chief Deputy can be demoted for purely political considerations. While the plaintiff argues that Kankakee County has a Merit Commission, he does not argue that the position of Chief Deputy was subject to Merit Commission jurisdiction, and the attachments to the response to the motion do not so state. I cannot find that the plaintiff enjoyed any greater protection from retaliatory political actions than the plaintiff in *Upton.*

The plaintiff also argues that this case is different from *Upton* because the plaintiff was subject to political retaliation for refusing to allow or condone illegal activity by officers under the plaintiff's supervision. The plaintiff argues that such retaliation violates Illinois public policy. While the plaintiff may state a claim under Illinois law for retaliatory discharge, *see, Palmateer v International Harvester Co.*, 85 Ill.2d 124 (1981), this court has no jurisdiction to hear that claim.

I find that the facts in this case are not legally distinguishable from the facts in *Upton.* The plaintiff does not state a claim under the Civil Rights Act.

Since I find that the plaintiff cannot state a constitutional claim against the individual defendants, he cannot state a vicarious constitutional claim against the County.

Accordingly, for the reasons discussed herein, I recommend that the Motion to Dismiss (#7 & 13) be ALLOWED; I further recommend that the Motion for Judgment (#22) be ALLOWED, and that the clerk be directed to enter judgment in favor of the defendants and against the plaintiff as to all counts.

The parties are advised that any objection to this recommendation must be filed in writing with the clerk of this court within ten (10) working days after service of this recommendation. *See,* 28 U.S.C. §636(b)(1). Failure to object will constitute a waiver of objections on appeal. *Video Views Inc. v Studio 21, Ltd.*, 797 F2d 538 (7Cir. 1986).

Enter this 26th day of March, 1992.

/s/ ROBERT J. KAUFFMAN
UNITED STATES MAGISTRATE JUDGE